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Supreme Court of the United States

October Term, 1972

72-661

JAMES LEDES,

Petitioner,

—against—

THE STATE OF NEW YORK,

Respondent.

PETITION AND APPENDIX FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Supreme Court of the United States

October Term, 1972

JAMES LEDES,

Petitioner,

—against—

THE STATE OF NEW YORK,

Respondent.

PETITION AND APPENDIX FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered June 1, 1972.

Judgment Below

The Court of Appeals affirmed the order of the New York Supreme Court, Appellate Division, First Department on June 1, 1972 without opinion, 30 N.Y. 2d 816, 334 N.Y.S. 2d 909 (1972). The order of the Appellate Division affirming the judgment of the New York Supreme Court, Bronx County, was entered on June 29, 1971, also without opinion, 323 N.Y.S. 2d 641 (1st Dept. 1971). The orders are printed in the Appendix to this petition (A. 1a).*

* References to the Appendix will be preceded by the letter "A".

Jurisdiction

The judgment of the New York Court of Appeals was entered on June 1, 1972 (A. 1a). An order extending time to file this petition to September 30, 1972 was signed by Mr. Justice Marshall and entered on August 29, 1972 (A. 2a); a similar order further extending time to October 30, 1972 was signed by Mr. Justice Marshall on September 20, 1972 (A. 3a). This petition is being filed within the time permitted under Rule 22(1) of the Rules of the Supreme Court as extended by orders of this Court. The Court's jurisdiction is invoked under Title 28, United States Code, Section 1257(3).

Question Presented

Should this Court let a conviction stand where Petitioner's fundamental right to a fair trial was denied by the combination of an inflammatory and prejudicial summation by the prosecutor and by seriously erroneous rulings by the Trial Court?

Constitutional Provision Involved

Fourteenth Amendment to the Constitution of the United States:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

1. Introduction

Petitioner, after a trial by jury on 12 counts of a 14 count indictment for criminally buying and receiving stolen property and criminally concealing and withholding stolen property in violation of former New York Penal Law § 1308, was convicted and sentenced to a term of two and one-half to four years in prison.

The leading witness for the prosecution upon whose testimony the conviction of Petitioner principally depended, was Joseph Arrighi, an admitted accomplice, as to whom the prosecutor promised to dismiss the charges in return for his testimony.

Four persons were allegedly involved in the incidents charged in the indictment—Arrighi, co-defendants Esposito, Bell and Petitioner. Esposito, a friend of Petitioner's, died before the trial; Bell was convicted with Petitioner.

The facts can be divided into two distinct categories, spanning a period of three days. The first phase related to the arrival of a truck driven by Bell containing the alleged stolen garments worth approximately $15,000 at Arrighi's apartment on July 6, 1967, the removal of the goods by Esposito, Bell and Arrighi to the apartment and arrangements between Esposito and Arrighi as to the use of the apartment. This phase did not involve Petitioner and need not be detailed here.

The second phase pertains to the arrival of Petitioner at the apartment with Esposito—a friend of Petitioner's—allegedly on July 6, after the goods were unloaded, his alleged discussion with Esposito as to the purchase of the goods, the alleged removal by him of some of the garments on that occasion and his return with Esposito on July 8. When Petitioner returned, the police were at the apartment and Esposito, Arrighi and Petitioner were arrested.

Petitioner took the stand in his own defense, maintaining innocence of the crimes charged. His version of the events sharply conflicted with that of Arrighi. Indeed, the principal issue presented for the jury's determination was the credibility of Arrighi and Petitioner as to the contrasting versions presented.

2. The Accomplice's Testimony as to the Alleged Involvement of Petitioner

Arrighi claimed that on July 6 Esposito told Petitioner in his presence at the apartment that the merchandise was worth about $40,000, but that he would sell it for $4,000. Arrighi claimed that they then agreed on the price—$4,000—and Petitioner allegedly gave Esposito $600, as an advance.

Arrighi testified that Petitioner and Esposito then assorted some merchandise for samples which Petitioner allegedly wanted to show prospective buyers. Arrighi went out to a closed supermarket to pick up some empty cartons, two of which were packed with a small amount of merchandise. Arrighi, Petitioner and Esposito carried them downstairs, putting the cartons in the trunk of Petitioner's car.

Esposito, according to Arrighi, never mentioned that the goods were stolen and had shown Petitioner bills of lading.

3. Arrival of the Police and Arrest of Petitioner and Esposito

On Saturday, July 8th, the police, presumably acting on a tip, entered Arrighi's apartment allegedly with Arrighi's permission, and asked him if he knew where the merchandise came from. Arrighi said they belonged to "Jimmie and Eddie."

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While the police were talking to Arrighi, Petitioner and Esposito entered the building carrying unconstructed brown cartons. The police asked Petitioner and Esposito what they were doing there, to which Petitioner responded that he heard he could get a "good buy." Petitioner and the others were thereupon arrested.

4. Testimony of Petitioner

At the time of trial, Petitioner owned a business in Manhattan called Honor Copystat Company. On July 8, 1967, he was the President of Superior Machine Woodcarving Company, where he worked with four employees. He is married and has three daughters.

On the evening of July 6, Esposito—whom Petitioner had known for about a year—came to Petitioner's house and asked him to take a ride with him. He said he was going to meet a friend of his whom he said had women's clothing purchased at a closeout. They went to a restaurant and Arrighi—whom Petitioner did not know—arrived shortly thereafter.

Arrighi met Esposito outside of the restaurant, where they conversed for a couple of minutes in a low tone, out of Petitioner's hearing.

At the restaurant, Arrighi mentioned that certain clothing was available and asked whether Petitioner wanted to buy some for his wife and children. He said that Petitioner should come to his apartment before the weekend was over because he intended to sell the merchandise by then.

Petitioner was planning at the time to go on vacation with his wife and children and thought it would be nice for them to have some new clothes. He said he would speak to his wife and let Esposito know.

They did not go to Arrighi's house that night. Instead, Esposito drove Petitioner home in his car, requesting that he ask his wife what she wanted and stating that he would come by or call and might work something out.

Esposito came to Petitioner's house on the evening of July 8. Petitioner had, in the meantime, spoken to his wife the night before and she was agreeable to his purchasing some shorts, slacks or blouses. He told his wife that it was a closeout, as he had been informed.

Petitioner and Esposito then drove to Arrighi's house, took some cartons from Esposito's car and went upstairs to the waiting police. The police asked what Petitioner was doing there and he said "I heard there was something to buy for my wife and kids there" and "I'm sorry, I'm really sorry", whereupon he was arrested.

Petitioner steadfastly denied having been to Arrighi's premises prior to that night, that he had ever paid Esposito for any clothing in Arrighi's premises, and that he knew the items were stolen clothing.

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Reason for Granting the Writ

The cumulative effect of an inflammatory summation by the prosecutor, and errors by the trial court in the restriction of cross-examination of the accomplice, in denying the receipt of irrelevant evidence and the charge to the jury denied petitioner his fundamental right to a fair trial and Due Process of Law.

A. The Summation of the Prosecutor was Highly Inflammatory and Prejudicial

The summation by the prosecutor, we submit, was highly inflammatory and prejudicial, transcending all established bounds of propriety. The errors committed included the following: (1) the prosecutor unfairly imputed a criminal disposition to petitioner; (2) the prosecutor injected himself personally, vouching for the credibility of the State's witnesses and backed his position with the prestige of the District Attorney's office and the Police Department; (3) the prosecutor relied on matters totally outside the record, indulged in gross speculation and rank conjecture, made unfair comment on the evidence and drew wholly unjustified inferences.

1. Imputation of Criminal Disposition to Petitioner

The prosecutor made repeated and emphatic allusions to Petitioner as an unsavory character, converting the legitimate use of Petitioner's one prior conviction—for a minor gambling offense—as relating solely to credibility, to attempt to have the jury draw the improper inference that Petitioner was a bad man with a propensity to commit the crime at bar. The prosecutor said:

> "Another consideration, you have to look at a man's *criminal background*. Does a man have prior conflict with the law? Again, *James Ledes fits the bill*" (emphasis supplied).

The intention of the prosecutor in utilizing Petitioner's prior record for improper purposes was further made apparent when he told the jury that "the People don't go into this type of case without investigating a man"—thereby also indicating that, in indicting Petitioner, they relied upon the impermissible inference that if he committed a prior crime, it demonstrated a criminal disposition and propensity to have committed the instant crime.

2. Personal Prestige of the Prosecutor, his Office and the Police

In his zeal, the prosecutor vouched for his witnesses' credibility and backed them up with all the prestige that he could muster—of himself, the District Attorney's office and the police.

The conflicting issue of fact for resolution by the jury hinged upon the credibility of Arrighi vs. Petitioner. The prosecutor repeatedly put himself on the line as a guarantor of Arrighi's credibilty, telling the jury "you bet he was telling the truth" and that "you could bet your bottom dollar they were illegitimately in this business."

In like vein, the prestige of his office was invoked by telling the jury:

> "Well, the People don't go into this type of a case without investigating a man and conducting an investigation".

After objection was sustained, he went right back to telling the jury that it "can infer that the People are well-prepared in this particular case". The additional evil inherent in this statement is the implication that once the District Attorney indicts, guilt is conclusively established; and further that the prosecutor is aware of additional facts which were not made known to the jury.

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3. Other Unfair Inferences from the Proof

In addition to the improper comment by prosecutor noted above, we also point to the following aspects of the summation where the prosecutor made unfair comment on the evidence:

(1) Petitioner testified that he previously had a cabinetry business and later admitted that his father also had an interest in the business. Grasping on this straw, the prosecutor sought to depict Petitioner as a liar, stating on the basis thereof:

> "Another deliberate falsehood, another indication of his failure to tell the truth. Another factor for you to consider, of whether he is the type of man to tell the truth under oath, in this type of a case."

This was a magnification out of all proportion of a family relationship where Petitioner could legitimately state—without being branded a liar—that notwithstanding the mutual interest of his father, he was the owner.

(2) Contrary to the record, Petitioner was accused of another "deliberate lie" in regard to his plea of guilty to the unauthorized use of a vehicle. He was asked on direct examination as to whether he was previously *"convicted"* of a crime and mentioned a juvenile offense involving gambling. The prosecutor, however, referring to the direct examination, accused him of not having answered truthfully and made a big issue over the fact that the plea did not come to light until it was asked—improperly—on cross-examintion. This is contrary to the record and eludes the distinction in law between a conviction and a plea of guilty. The conviction had not yet materialized—and in fact, as of the time of sentence, Petitioner was in the process of moving to withdraw the prior guilty plea. This was the obvious reason for Petitioner's answer on direct examination and the prosecutor took unfair advantage of the circumstances and compounded the error in permitting inquiry concerning the plea of guilt.

Moreover, although it is a well recognized principle of law that a defendant who takes the stand can have his credibility impeached by a showing of prior convictions, *McGautha* v. *California*, 402 U.S. 183, 216 (1971); *Spencer* v. *Texas*, 385 U.S. 554, 561 (1967), in order to use a prior conviction for impeachment purposes the conviction must be final. See *United States* v. *Semensohn*, 421 F.2d 1206, 1208 (2d Cir. 1970); *Newman* v. *United States*, 331 F.2d 968, 972 (8th Cir. 1964), *cert. denied*, 379 U.S. 975 (1965); *Fenwick* v. *United States*, 252 F.2d 124, 126 (1958); *Beasley* v. *United States*, 218 F.2d 366, 368-9 (1954), *cert. denied*, 349 U.S. 907 (1955); *Campbell* v. *United States*, 176 F.2d 45, 47 (D.C. Cir. 1949).

B. The Rulings of the Court Below in Limiting the Admission of Prior Inconsistent Statements of the Accomplice were Erroneous and Grossly Prejudicial to the Defense

Petitioner was further deprived of a fair trial by reason of certain rulings of the trial court—particularly those involving prior inconsistent statements of Arrighi given to the attorney of Petitioner.

Prior to the trial, Petitioner's trial counsel advised the court that Arrighi had been in to see him soon after the original indictment was returned and made certain exculpatory statements to him as to Petitioner, in Petitioner's presence, after counsel told Arrighi he could not represent him. Defense counsel accordingly sought to cross-examine Arrighi as to the statements made by him, but, on objection by the prosecutor, who invoked the attorney-client privilege on Arrighi's behalf, the substance of the conversation was not permitted.

We maintain that this was serious error. The statements made by Arrighi contrary to his testimony at trial—and before any promise had been made to him by the District

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Attorney—were singularly important to impeach his credibility and corroborate the version of the facts adduced by the defense. Because there was no attorney-client relationship between Arrighi and the lawyer and because Arrighi made the exculpatory statements in the presence of a third party, it was clear that the attorney-client privilege did not apply under New York law, *Bauman* v. *Steingester*, 213 N.Y. 328 (1915).

C. The Court Erred in its Charge to the Jury

1. Criminal Intent

The Court instructed the jury on the issue of criminal intent as follows, in relevant part:

> "Guilty knowledge means *not only actual knowledge but also constructive knowledge,* and this may be shown by the establishment of circumstances from which guilty knowledge may be fairly inferred." (emphasis added).

Exception was taken to this aspect of the charge which, we submit, is at variance with established state law as to the knowledge required (*People* v. *Prince*, 19 App. Div. 2d 730, 242 N.Y.S. 2d 379, 380 [2d Dept. 1963]; *People* v. *Checkman*, 284 App. Div. 44, 129 N.Y.S. 2d 869, 870-1 [4th Dept. 1954]). The "correct test is *actual* knowledge, not negligence in failing to make resonable inquiry". (*People* v. *Prince, supra.*) "A finding of carelessness, negligence or indolence in investigation is not a substitute for guilty knowledge". (*People* v. *Checkman, supra.*)

2. Interest of the Accomplice

The court gave the standard simple state instruction that the testimony of Arrighi, as an accomplice, must be examined very closely and received with great caution.

We submit, however, that this was not nearly sufficient because the jury was instructed as to Petitioner—whose credibility was pitted against Arrighi's—that he had an interest in the outcome of the case; and that if his testimony was "in conflict with the testimony of other witnesses", the jury had a right to determine that there was "inducement" for him to "testify falsely".

In the interest of fairness, the same should have been indicated as to Arrighi. He had as much, if not more at stake than Petitioner in testifying falsely so as not to alienate the prosecutor and ensure that the charges against him were dismissed in effectuation of the bargain made.

* * * * *

This case warrants review by this Court, not necessarily because any one of the errors alluded to above violated Petitioner's fundamental right to a fair trial, but, rather, because the cumulative effect of all the errors, particularly the overbearing summation by the prosecutor, infected the proceedings to such an extent that there was a clear denial of Due Process guaranteed under the Fourteenth Amendment.

Due Process is violated whenever a conviction in a criminal trial is obtained in such a manner as to offend those principles of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental". *Snyder* v. *Commonwealth of Massachusetts,* 291 U.S. 97, 105 (1934); *Rochin* v. *People of State of California,* 342 U.S. 165, 169 (1952). *See, also, Betts* v. *Brady,* 316 U.S. 455, 462 (1942), where the test used in reviewing procedures during a state criminal trial was whether or not there was "a denial of fundamental fairness, shocking to the universal sense of justice. . . ". Where a criminal proceeding in state court contains prosecutorial statements which are not only inflammatory but contain unfair inferences from the facts in evidence together with prejudicial rulings by the trial

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judge, as here, the totality of these circumstances meets the test laid down in the above-cited cases. *See also, Mooney* v. *Holohan,* 294 U.S. 103 (1935); *Burwell* v. *Teets,* 245 F.2d 154 (9th Cir. 1957).

In *Pike* v. *Dickson,* 323 F.2d 856 (9th Cir. 1963), the Court recognized the rather elementary proposition that "[t]he conduct of the prosecutor at the trial . . . [can] amount to a denial of due process", and in *Campbell* v. *United States,* 429 F.2d 209 (D.C. Cir. 1970), the Court held the prosecutor's extensive reliance upon an invalid assumption during summation was a denial of due process and required reversal of the conviction. Inflammatory statements during closing arguments, such as the ones in the case at bar, which tend to prejudice defendant's right to a fair trial have been held to be reversible error. *United States* v. *Schartner,* 426 F.2d 470, 478 (3rd Cir. 1970); *United States* v. *Birrell,* 421 F.2d 665 (9th Cir. 1970); *United States* v. *Gambert,* 410 F.2d 383, 384 (4th Cir. 1969); *United States* v. *Hughes,* 389 F.2d 535 (2d Cir. 1968).

In sum, we submit, the circumstance of this case so far depart from the accepted norm, that review is warranted by this Court.

CONCLUSION

Under all the circumstances herein set forth, it is respectfully prayed that a writ of certiorari should issue to review the judgment of the New York Court of Appeals.

Respectfully submitted,

ELKAN ABRAMOWITZ,
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APPENDIX

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Order of New York Supreme Court, Appellate Division, First Department, Dated June 29, 1971, 323 N.Y.S. 2d 641 (1st Dept. 1971) 1a

Order Extending Time to File Petition for Writ of Certiorari to September 30, 1972, Dated August 29, 1972 ..... 2a

Order Extending Time to File Petition for Writ of Certiorari to October 30, 1972, Dated September 20, 1972 ..... 3a

Order of New York Court of Appeals, Dated June 1, 1972, 30 N.Y. 2d 816, 334 N.Y.S. 2d 909 (1972)

PEOPLE, etc., Respondent, v. ALEXANDER GRAHAM BELL, Appellant.

PEOPLE, etc., Respondent, v. JAMES LEDES, *Appellant.*

Court of Appeals of New York.

June 1, 1972.

Appeals from the Supreme Court, Appellate Division, First Department, as follows: People v. Bell, 37 A.D. 2d 692, 323 N.Y.S. 2d 641 and People v. Ledes, 37 A.D. 2d 693, 323 N.Y.S. 2d 641.

Order affirmed.

All concur.

Order of New York Supreme Court, Appellate Division, First Department, Dated June 29, 1971, 323 N.Y.S. 2d 641 (1st Dept. 1971)

The PEOPLE of the State of New York, Respondent, v. James LEDES, Defendant-Appellant.

Supreme Court, Appellate Division, First Department, June 29, 1971. E. L. Kaplan, New York City, for respondent. J. W. Heller, New York City, for appellant. Judgment, Supreme Court, Bronx County (McCaffrey, J.), rendered on April 10, 1970, unanimously affirmed. No opinion.

McGIVERN, J.P., and NUNEZ, MURPHY, TILZER, and EAGER, J.J., concur.

Order Extending Time to File Petition for Writ of Certiorari to October 30, 1972, Dated September 29, 1972

SUPREME COURT OF THE UNITED STATES

No. A-254

JAMES LEDES,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby further extended to and including October 30, 1972.

THURGOOD MARSHALL
Associate Justice of the Supreme Court of the United States

Dated this 20th day of September, 1972

Order Extending Time to File Petition for Writ of Certiorari to September 30, 1972, Dated August 29, 1972

SUPREME COURT OF THE UNITED STATES

No. A-254

JAMES LEDES,

Petitioner,

v.

NEW YORK

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby further extended to and including September 30, 1972.

/s/ THURGOOD MARSHALL
Associate Justice of the Supreme Court of the United States

Dated this 29th day of August, 1972.